Supreme Court, U.S.
FILED

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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1996

ROBERT C. HENSON, *Petitioner,*

v.

THE CITY OF GREENSBORO
NORTH CAROLINA, *Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Does the Americans with Disabilities Act require a determination of whether or not an employee with a disability can perform the essential functions of the job with reasonable accommodation?

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Petitioner Robert C. Henson respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on February 24, 1997.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of North Carolina (Erwin, J.) is not officially reported. The opinion is reprinted in the appendix, p. A-1, infra.

The opinion of the United States Court of Appeals for the Fourth Circuit (per curiam) is not yet reported. The opinion is reprinted in the appendix, p. A-8, infra.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit rendered its opinion on February 24, 1997, affirming the district court's decision granting summary judgment for respondent.

This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).[1]

[1]The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of the district court was by removal pursuant to 28 U.S.C. § 1441, with the underlying jurisdictional basis being 42 U.S.C. § 12117(a), incorporating by reference 42 U.S.C. § 2000(e)-5(f)(3).

STATUTE AND REGULATION INVOLVED

42 U.S.C. § 12111(8) and (9):

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include -- . . .

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

29 C.F.R. § 1630.2(o):

> (o) Reasonable accommodation.
>
> (1) The term reasonable accommodation means:. . .
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; . . .
>
> (2) Reasonable accommodation may include but is not limited to: . . .
>
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; . . .

STATEMENT OF THE CASE

Petitioner has a permanent back impairment that prevents him from lifting more than 15 to 20 pounds, from doing extensive pushing or pulling, from sitting two or three hours without having to stand, and from being on his feet for two or three hours without having to rest. (A.220-21, 223).

Plaintiff was dismissed on October 31, 1993, from a position he had held for 13 1/2 years, as lake warden or park ranger at respondent's city lakes. Petitioner's job duties included teaching classes to school children, maintaining grounds, renting boats, cleaning out boats, providing assistance to members of the public, mowing grass and

trimming leaves, signing fishermen in and out, writing lake permits, selling fishing licenses, opening and closing the lakes, enforcing safety rules, weighing fish for contests, using a patrol boat, and cleaning the office and restrooms. (A.62, 74-81).

Petitioner injured his back in an automobile wreck not connected with work on February 10, 1993. He continued to work for a time, but when his condition worsened, he was ordered off the job and to bed rest by his physician beginning June 2, 1993. (A.103-04, 107-08, 114-16, 116a).

Petitioner and his physician agreed on July 2, 1993, that he should try going back to work with minimized bending and lifting for the time being. This proposal was communicated to respondent. (A.198, 201, A.35-36). Respondent replied that before petitioner could be returned to work, he would have to be evaluated by the city medical services. However, respondent never scheduled an independent medical examination and ultimately dismissed petitioner. (A.37, 231-36, 238-40, 253).

Respondent had an extended sick leave policy, which may have been applicable to petitioner. The policy required that a request for sick leave be initiated by the employee's department head. Instead of pursuing the sick leave policy, petitioner's department head falsely certified that petitioner had voluntarily resigned (A.179-81).

Respondent admitted that it could have designed a light duty job for petitioner at one of the city lakes. Because petitioner's totally incapacitating disability extended only for a short duration, it was a virtual certainty that a job could

have been provided to fit his long term work limitations. Respondent clearly understood petitioner's request in July, 1993, to be for temporary light duty until his recovery. Also respondent could have accommodated petitioner's permanent limitations on lifting, standing, stooping, and bending. Respondent acknowledges that the Americans with Disabilities Act requires accommodation in the form of light duty for employees who have temporary limitations, and also disabilities of longer duration. Respondent acknowledges that there would have been no problem reasonably to accommodate petitioner's disabilities, and that there certainly would have been no health or safety threat as a result of accommodating petitioner's needs. (A.182-83, 252, 261, 263-64, 265a).

Petitioner believes he could have done fully half of his duties at one of the city lakes upon completion of his recovery. Had he been put back on the job, he would have tried to take on more and more duties as time went on. (A.163-64).

Petitioner brought an action for discrimination in employment under the Americans with Disabilities Act. The district court granted respondent's motion for summary judgment.

In a per curiam opinion, the United States Court of Appeals for the Fourth Circuit affirmed. The court held that petitioner could no longer perform the essential functions of his job and, therefore, was not a qualified individual under the act. The court made no determination, and did not discuss, whether or not petitioner could have performed the essential functions of his job with reasonable accommodation.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE LANGUAGE OF THE STATUTE AND ITS MANIFEST INTENT.

The court of appeals has attempted to read out of the statute, the requirement that an employee's ability to perform the essential functions of the job be considered in light of reasonable accommodation by the employer.

The requirement of reasonable accommodation, which is the very core of the Americans with Disabilities Act, is set forth in the definition of persons who are subject to the protection of the statute. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . ." 42 U.S.C. § 12111(8) [emphasis added].

The court of appeals stated that after his injury petitioner could "no longer perform the essential job functions of lake ranger and therefore, he is not a qualified individual." (Appendix, p. A-9, infra). That ended the court's inquiry.

The court of appeals did not take into account in any way the unrebutted testimony, consisting of admissions by respondent's management personnel, that petitioner's disability easily could have been accommodated; that this accommodation would have been consistent with respondent's existing policies and practices; and that there would have been no health or safety threat as a result of

accommodating petitioner's needs. (A.182-83, 252, 261, 263-64, 265a).

Reasonable accommodation is statutorily defined, as relevant to this case, to include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). The applicable regulations state that reasonable accommodation means "modifications or adjustments . . . to the manner or circumstances under which the position held . . . is customarily performed, . . . " The regulations also state that reasonable accommodation may include but is not limited to "job restructuring; part-time or modified work schedules; reassignment to a vacant position; . . . and other similar accommodations for individuals with disabilities." 29 C.F.R. § 1630.2(o)(1)(ii),(2)(ii).[2]

This Court, interpreting language in the Rehabilitation Act and its regulations, 29 U.S.C. §§ 706, 794, and 45 C.F.R. § 84, which is similar to the provisions of the Americans with Disabilities Act here in issue, has ruled that, "When handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions." School Board of Nassau County v. Arline, 480

[2]The regulations or guidelines, "'while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort to guidance.'" Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986), quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976), and that Griggs v. Duke Power Co., 401 U.S. 424, 423, 433-34 (1971).

U.S. 273, 288, n.17 (1987). This Court has made it clear that the decision is to whether essential job functions can be performed with reasonable accommodation requires individualized inquiry and a factual determination. 480 U.S. at 287.[3]

If an employee with a disability is protected by law only when he can perform the essential functions of the job without accommodation, as the court of appeals decided in the present case, the Americans with Disabilities Act would provide no protection whatever to persons who are actually handicapped to the extent that they cannot perform some essential job functions. Under this reading, the statute would only provide protection to those employees, whose disabilities were incorrectly perceived as limiting their abilities to carry out all essential job functions. This reading of the act is plainly at odds with its clear language and manifest intent.

[3]Formerly the Rehabilitation Act did not require a consideration of reassignment of the handicapped employee to a more suitable position. The Americans with Disabilities Act, on the other hand, expressly requires that reassignment be considered. The Rehabilitation Act was amended in 1992 to incorporate this and other Americans with Disabilities Act standards. 29 U.S.C. § 794(d). Accordingly, the regulations were amended effective October 31, 1992, to provide that an offer must be made to reassign an employee who becomes unable to perform the essential functions of his job. 29 C.F.R. § 1614.203(g).

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH LEADING DECISIONS IN ALL OTHER CIRCUITS THAT HAVE CONSIDERED THE QUESTION.

The District of Columbia, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all made it clear that under the Americans with Disabilities Act, if the employee cannot perform essential job functions by reason of disability without accommodation, it is necessary to make a further and fact specific inquiry as to whether or not he can perform these job functions with reasonable accommodation. Langon v. Health and Human Services Department, 959 F.2d 1053, 1060-61(D.C. Cir. 1992); Borkowski v. Valley Central School District, 63 F.2d 131, 140-41 (2d Cir. 1995); Shiring v. Runyon, 90 F.3d 827, 831-32 (3d Cir. 1996); Chandler v. City of Dallas, 2 F.3d 1385, 1393-94 (5th Cir. 1994); Tuck v. HCA Health Services of Tennessee, Inc., 7 F.3d 465, 471-74 (6th Cir. 1993); Feliberty v. Kemper Corp., 98 F.3d 274, 280-81 (7th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Reynolds v. Brock, 815 F.2d 571, 574-75 (9th Cir. 1987) (Rehabilitation Act); Lowe v. Angelo's Italian Foods, 87 F.3d 1170, 1174 (10th Cir. 1996).

In the present case, the Fourth Circuit stands alone among all the courts of appeals which are on record on the point, holding that the question of reasonable accommodation need not be considered, once it is determined that a disabled employee cannot perform one or more essential functions of the job. This decision of the Fourth Circuit, not only is in conflict with the other courts of appeals, but also is wholly inconsistent with this Court's decision in School Board of Nassau County v. Arline, supra.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the decision of the court of appeals.

This 1st day of May, 1997.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ROBERT C. HENSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	2:95CV00022
	)	
CITY OF GREENSBORO,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

ERWIN, Senior Judge

This matter is before the Court on Defendant's Motion for Summary Judgment. Plaintiff has responded to the motion, and the Court is now ready to rule. Defendant's summary judgment motion is GRANTED.

Statement of Facts

From March 17, 1980 to October 31, 1993, Plaintiff Henson was employed by Defendant City of Greensboro (City) as a lake warden at the city lakes, working primarily at Lake Brandt. His official job responsibilities included selling permits, selling fishing licenses, opening and closing the lakes, mowing and keeping up the grounds, keeping the boats clean and in good repair, enforcing safety rules,

weighing fish for contests, using the patrol boat, and cleaning the office and rest rooms.

On February 10, 1993, the Plaintiff was involved in an automobile accident. Within four or five days, he was treated for back pain by an internist who prescribed muscle relaxers and pain medication. When the back pain persisted, Henson consulted an orthopedic specialist on April 21, 1993, who issued a report stating that he was able to return to light work that involved no frequent bending, stooping, or squatting and no lifting of objects over fifteen pounds.

Plaintiff continued to work for the City until June 2, 1993 when intensified pain in the back and numbness in the left leg sent him to his orthopedist for a second time. The orthopedist ordered him off his job and to bed rest until June 21, 1993. The Plaintiff never returned to work for the City.

On June 23, 1993, the attorney who represented Henson in connection with his automobile accident, wrote letters to various city employees. Enclosed with the letters, was a report from Plaintiff's orthopedist, dated June 22, 1993 that ordered two more weeks out of work with bed rest. By letters dated July 7 and 8, 1993, the attorney furnished the City with additional reports from the orthopedist stating that Henson was still unable to return to carry out his regular job duties and inquired about the possibility of the Plaintiff's returning to work during his recovery period in a capacity different from the one previously held.

The City's personnel director responded in writing explaining that it would be necessary for the Plaintiff to be evaluated by the City's Medical Services Department, who would confer with Plaintiff's doctors and make arrangements

for him to return to work if a suitable position could be found. Neither the Plaintiff nor the City made any effort to schedule an appointment, and there was no further discussion about trying to find suitable employment. Two months elapsed thereafter with no contact between the Plaintiff and the City.

Henson came under the care of a family practice physician on September 17, 1993, who opined that although the Plaintiff was improving, he was still unable to work in any capacity as of that date. The physician expressed the same opinion again on October 25, 1993. The family practice physician could not determine precisely when the Plaintiff might be able to return to work.

As a result of Plaintiff's failure to inform the City of a prognosis for his return to work and because of an acute manpower shortage within the work unit, the City released the Plaintiff from his position on October 31, 1993.

Plaintiff filed a Complaint on December 8, 1994, alleging that the City discriminated against him and wrongfully terminated him in violation of the Americans with Disabilities Act (ADA). Defendant subsequently filed a Motion for Summary Judgment, which is presently before this Court.

Analysis

The Court will grant summary judgment when no genuine dispute of material facts exist and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In considering Defendant's motion, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light

most favorable to the party opposing the summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Where the Plaintiff is unable to produce sufficient evidence beyond the bare allegations of the Complaint to support an essential element of his case, summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In Ennis v. National Assn. of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995), the court established the elements for a prima facie case of wrongful discharge in violation of the ADA. Essentially, the plaintiff must prove that (1) he was in the protected class; (2) he was discharged; (3) at the time of the discharge, he was performing his job at a level that met the employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. Id. at 58.

The Defendant makes two argument in the Motion for Summary Judgment in regard to the Ennis factors. The first argument is that Henson was not in the protected class. The second argument is that Henson cannot meet his burden of proving that he met the City's legitimate expectations with his work performance or that the circumstances raise a reasonable inference of unlawful discrimination.

The Court finds that Henson is not within the class of people protected by the ADA. Even if Plaintiff could demonstrate that he is "disabled" under the ADA in that he suffers from an impairment that "substantially limits" a major activity, he is unable to come forward with specific facts showing that there is a genuine issue with respect to his

status as a qualified individual.[1]

Under the ADA, a "qualified individual" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.A. § 12111(8) (West 1995). The Court's chief consideration then is whether Henson can perform the essential functions of his job as a lake warden.

In determining which job functions are essential, the ADA instructs that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C.A. § 12111(8) (West 1995). A job function may be considered essential if, inter alia, (1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed, or (3) the function is highly specialized so that the incumbent in the position is hired for his ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2) (1995).

The job at issue is known as "lake warden," "park ranger," or "park specialist." A listing of the job duties and responsibilities for full and part-time lake wardens is included in the record. The description states that wardens

[1] Under the ADA, "disability" means "a physical or mental impairment that substantially limits one or more of a person's major life activities." 42 U.S.C.A. § 12102(2)(A) (West 1995).

must "do mowing, weed eating and keep up the grounds," "weigh fish," and "help keep boats pumped out, dipped, cleaned and in good repair." The job description also specifically notes that "trim must be cut with push mower" and that the warden must "pick up litter on grounds as required." (Smith Dep. Ex. 38.)

Although the position summary is not conclusive evidence of the essential functions of a lake warden, the duties and responsibilities listed in the document are "functions that bear more than a marginal relationship to the job at issue." Tyndall v. National Educ. Centers, 31 F.3d 209, 213 (4th Cir. 1994). Thus, the "plaintiff bears the burden of demonstrating that [he] could perform the essential functions of [his] job with reasonable accommodation." Id. at 213 (citing Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990)).

Of his listed official duties, Henson had many physically demanding job assignments. His eight percent disability of the back gave him notable limitations on lifting, standing, stopping and bending. Accommodating Plaintiff's disabilities would require more than just the reassignment of those peripheral tasks that Plaintiff is unable to perform; it would require redefinition of the essential functions of his job. "[T]he duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position." Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995). See also, Guillot v. Garret, 970 F.2d 1320, 1326 (4th Cir. 1992). Reasonable accommodation also does not mean that an employer must allow an employee to miss work indefinitely. See Tyndall, 31 F.3d at 214.

The City held Henson's job open for five months after his last day of work. At the time Henson was removed from the payroll, his doctor was of the opinion that he was unable to work and could not say when he would be able to return to work. These factors, taken as a whole, support the conclusion that the Plaintiff was unable to perform the essential functions of the position he then held, with or without reasonable accommodation. Since the Court finds that Henson is not a qualified individual under the ADA, it need not address the second argument presented in Defendant's Motion.

Conclusion

The Defendant's Motion for Summary Judgment is granted. Plaintiff has failed to come forward with facts sufficient to form a genuine issue that he is a qualified individual and thus in the class of individuals protected under the ADA.

_____

Senior United States District Judge

December 12, 1995.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT C. HENSON,
Plaintiff-Appellant,

v.

THE CITY OF GREENSBORO, NORTH CAROLINA,
Defendant-Appellee.

No. 96-1071

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro.
Richard C. Erwin, Senior District Judge.
(CA-95-22-2)

Submitted: January 31, 1997

Decided: February 24, 1997

Before HALL, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Norman Barrett Smith, SMITH, FOLLIN & JAMES, Greensboro, North Carolina, for Appellant. Martin N. Erwin, John J. Korzen, SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellee.

BEST AVAILA

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert Henson appeals from the district court's order granting summary judgment to the Defendants and dismissing Henson's action under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994). We affirm.

Henson, a former lake ranger employed by the City of Greensboro (City), claims that the City had the duty, under the ADA, to reasonably accommodate him when he injured his back in a non-work related automobile accident. *See* 29 C.F.R. § 1630.9(a) (1995). To bring a claim under the ADA, Henson must establish that he: (1) has a disability, (2) is otherwise qualified for the employment or benefit in question, and (3) was excluded for the employment or benefit due to discrimination solely on the basis of the disability. *See Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994).* The ADA defines a qualified individual as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.A. § 12111(8) (1995). Review of the record reveals that Henson can no longer perform the essential job functions of lake ranger and therefore, he is not a qualified individual. Accordingly, we affirm the district court's order.

We dispense with oral argument because the facts and legal conten-

*The district court relied on the proof scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1979). However, because there is no factual dispute over the reasons for discharge, this proof scheme is not appropriate. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 348 n.1 (4th Cir. 1996). Regardless, under the proof scheme of *Tyndall*, Henson fails to make out a prima facie case of discrimination under the ADA.

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tions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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Supreme Court, U.S.
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No. 96-1797

In The Supreme Court Of The United States

OCTOBER TERM 1996

ROBERT C. HENSON,

Petitioner,

v.

THE CITY OF GREENSBORO, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 96-1797

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ROBERT C. HENSON,
Petitioner,
v.

THE CITY OF GREENSBORO, NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of a decision of the United States Court of Appeals for the Fourth Circuit which affirmed a decision of the United States District Court for the Middle District of North Carolina granting summary

judgment for the respondent-defendant. The opinion of the District Court has not been published and is reproduced at page A-1 of the Petition. The unpublished opinion of the Court of Appeals is reproduced at page A-8 of the Petition.

STATEMENT OF THE CASE

The essential facts of this case, as recited by the District Court, are that the plaintiff was injured in an automobile accident unrelated to his work and was unable to work in any capacity at the time his employment was terminated after an absence of five months. Based on these facts, the District Court held that the plaintiff-petitioner was not a qualified individual with a disability because he could not perform the functions of his job with or without reasonable accommodation. Petition at page A-6-7. The Fourth Circuit affirmed in an unpublished, *per curiam* opinion. Petition at page A-8.

ARGUMENT

The holding below is not "a decision in conflict with the decision of another United States court of appeals on the same important matter" within the meaning of Rule 10(a) of the Rules of the Supreme Court. To the contrary, the case is a routine, unpublished, *per curiam* opinion that is not a binding precedent under Local Rule 36(b) and (c), as shown on the face of the opinion. Petition at page A-9. Local Rule 36(b) and (c) is reproduced in the Appendix to this Brief in Opposition.

In addition, the rule in the Fourth Circuit is that a determination of whether the individual could perform with reasonable accommodation is required in each case, the very rule for which the petitioner contends. As it was most recently pronounced, the rule is as follows: "Even if a person is unable to perform the essential functions of the job in question, a 'court must nevertheless determine whether the

person could do the job with reasonable accommodation.'" *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997), *citing, Myers v. Hose*, 50 F.3d 278, 281-82 (4th Cir. 1995), and *Doe University of Maryland Medical System Corp.*, 50 F.3d 1261, 1264-66 (4th Cir. 1995).

The rule as it was announced in *Martinson, Myers* and *Doe* is precisely the rule applied in the cases from other circuits that are cited in the Petition, and the rule could not be changed by the Fourth Circuit panel that heard this case even if the decision below were published. *Norfolk and Western Ry.Co. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir. 1993) (a panel of the court of appeals may not overrule another panel's decision). Clearly, an unpublished decision with no binding effect as precedent did not overrule the published opinions in *Martinson, Myers* and *Doe*.

CONCLUSION

For these reasons, the Respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Local Rule 36(b) and (c) provides as follows:

[36(b)] Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. All opinions are available on ABBS, the Appellate Bulletin Board System, for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

[36(c)] In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral

arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28 (b).